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CONSTITUTIONAL LAW—Statute Allowing Substitution of Judge upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine. *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

In *State v. Holmes*¹ the Wisconsin Supreme Court became the first state appellate court to sustain a statute² which

1. 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

2. WIS. STAT. § 971.20 (1979), *repealed and recreated by* 1981 Wis. Laws 137. This statute provided:

Substitution of Judge.

(1) The defendant or the defendant's attorney may file with the clerk a written request for a substitution of a new judge for the judge assigned to the trial of that case. The request shall be signed by the defendant or the defendant's attorney personally and shall be made before making any motion or before arraignment. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action.

(2) Upon the filing of the request in proper form and within the proper time the judge named in the request has no authority to act further in the case except to conduct the initial appearance, accept the pleas of not guilty, and set bail. Except as provided in subs. (7) and (8), no more than one judge may be substituted in any action.

(3) In addition to the procedure under sub. (1) a request for the substitution of a judge may also be made by the defendant at the preliminary examination except that the request must be filed at the initial appearance or at least 5 days before the preliminary examination unless the court otherwise permits.

(4) When a judge is substituted under this section, the clerk of circuit court shall request assignment of another judge under s. 751.03.

(5) The request in sub. (1) may be in the following form:

STATE OF WISCONSIN,

.... County,

.... Court

State of Wisconsin

vs.

.... (Defendant)

Pursuant to s. 971.20 the defendant requests a substitution for the Hon. . . . as judge in the above entitled action.

Dated

.... (Signed by defendant personally)

(6) Upon the filing of an agreement signed by the defendant in a criminal action or proceeding, by the prosecuting attorney, by the original judge for which a substitution of a new judge has been made, and by the new judge, the criminal action or proceeding and pertinent records shall be transferred back to the original judge.

allows the substitution of a trial judge upon a peremptory challenge.³ In a unanimous decision, the court ruled that the Wisconsin judicial substitution statute was enacted to assure a fair trial and that the substitution procedure is "an aspect of the judicial system which is subject to reasonable legislative regulation."⁴ Although the court declared that any such legislative regulation is subject to judicial review to preserve the integrity of the doctrine of separation of powers, it determined that the substitution statute did not impede the functioning or jurisdiction of the circuit courts so as to violate that constitutional doctrine.⁵ Although the *Holmes* decision involved the criminal substitution statute, it appears that the decision has direct application to other substitution statutes as well.⁶

This note will first describe the various judicial substitution procedures used in the United States and the Wisconsin

(7) If the judge who heard the preliminary examination is the same judge who is assigned to the trial of that case, the defendant or the defendant's attorney may file a request under sub. (1) within 7 days after the preliminary examination or at the time of the arraignment, whichever occurs first, and still retain the right for one additional request under sub. (1).

(8) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order in a manner such that further proceedings in the trial court are necessary, the defendant or the defendant's attorney may file a request under sub. (1) within 20 days after the entry of the judgment or decision of the appellate court whether or not another request was filed prior to the time the appeal or writ of error was taken.

3. "Peremptory" is defined as: "Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown." BLACK'S LAW DICTIONARY 1023 (rev. 5th ed. 1979).

In five previous cases where a peremptory substitution statute similar to Wisconsin's has been challenged, the statutes have been declared unconstitutional as violative of the doctrine of separation of powers. *Austin v. Lambert*, 11 Cal. 2d 73, 77 P.2d 849 (1938); *Daigh v. Schaffer*, 23 Cal. App. 2d 449, 73 P.2d 927 (1937); *Johnson v. Goldman*, 94 Nev. 6, 575 P.2d 929 (1978); *State ex rel. Clover Valley Lumber Co. v. Sixth Judicial Dist. Ct.*, 58 Nev. 456, 83 P.2d 1031 (1938); *State ex rel. Bushman v. Vandenberg*, 203 Or. 326, 280 P.2d 344 (1955). *Austin* and *Daigh* also ruled the statute unconstitutional as a denial of equal protection because the district attorney was not also allowed a substitution. 11 Cal. 2d at ___, 77 P.2d at 853-54; 23 Cal. App. 2d at ___, 73 P.2d at 934.

4. *Holmes*, 106 Wis. 2d at 38, 315 N.W.2d at 707.

5. *Id.*

6. See WIS. STAT. § 48.29 (1979) (juvenile code); *id.* § 345.315 (traffic violations); *id.* § 799.205 (small claims); *id.* § 801.58 (civil proceedings).

statute governing judicial substitution in criminal cases. Second, it will discuss the manner in which the Wisconsin Supreme Court analyzed two questions: whether a trial court can raise a constitutional challenge sua sponte; and whether the Wisconsin judicial substitution statute violated the doctrine of separation of powers. Third, it will consider the aftermath of *Holmes* in terms of its impact on substitution legislation and on proposed supreme court rule changes affecting the substitution statute.

I. BACKGROUND OF SUBSTITUTION PROCEDURES

The right of a defendant to challenge a judge originally assigned to hear the case stems from the constitutional guarantee of a fair trial.⁷ The right to a fair trial has been recognized to include a trial before an unbiased or impartial judge.⁸ To carry out this guarantee, many states provide, either by statute or court rule, procedures whereby a litigant can seek disqualification of a judge who is perceived to be unsuitable to hear a particular case.⁹ However, the factors held to indicate bias and the procedures to be followed to obtain substitution of a judge vary greatly from state to state.

Almost one half of the states rely on common law or constitutional limitations to govern their disqualification rules.¹⁰ At common law, reasons recognized as valid for disqualifying a judge included having pecuniary interest in the case, being related to one of the parties and having previously acted as counsel in the case.¹¹ Bias or prejudice of the judge

7. A fair trial is a requirement of the due process guarantee of the fourteenth amendment. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Ideally, a judge with bias or interest will recuse himself or herself from a case. However, since a judge does not always recognize his or her prejudice, substitution procedures allow a party to challenge the partiality of the judge.

8. *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. Bell*, 62 Wis. 2d 534, 536, 215 N.W.2d 535, 537 (1974).

9. Fifteen states have enacted statutes regulating substitution. Thirteen states have court rules on substitution. The remaining 22 rely on common law or constitutional limitations. Brief for Respondents at 22-23, *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

10. Report, *Disqualification of Judges for Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 332 (1969).

11. Note, *Disqualification of Judge for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1436 (1966).

was generally not recognized as a basis for disqualification.¹² In an effort to extend disqualification beyond the narrow common-law concept, many states have enacted statutes to govern substitution procedures.¹³ Such statutes often include bias or prejudice as a reason for disqualification.¹⁴

These statutes can be categorized into four types.¹⁵ The first type requires that a hearing be held to determine the presence or absence of actual prejudice once it has been alleged by one of the parties.¹⁶ This constitutes the most restrictive and cumbersome procedure used. The second requires an affidavit of prejudice containing facts indicating the prejudice, but does not require a hearing to determine the truth or legal sufficiency of the facts alleged.¹⁷ The third method permits disqualification upon submission of an affidavit of prejudice in which specific allegations of prejudice do not have to be stated.¹⁸ Finally, the most liberal substitution procedure allows the filing of a request for substitution without any statement of prejudice. This method is often called peremptory substitution because, like a peremptory challenge to a juror, no reason need be stated.¹⁹

The diversity of substitution procedures reflects the disagreement as to where a balance should be struck between

12. Bias or prejudice was not viewed as a valid reason for disqualification because, since the judge determined only questions of law, a personal bias would not affect the fairness of the trial. See Report, *supra* note 10, at 328.

13. See Note, *supra* note 11, at 1436.

14. Report, *supra* note 10, at 332.

15. See *id.* at 332-48.

16. *Id.* at 336.

17. The federal judicial substitution procedure (codified at 28 U.S.C. § 144 (1976)) is in this category. Some writers have urged this be changed to a peremptory procedure. E.g., Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970); Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109 (1974); Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139 (1976). Others oppose change. E.g., Bartels, *Peremptory Challenges to Federal Judges: A Judge's View*, 68 A.B.A. J. 449 (1982); Getto, *Peremptory Disqualification of the Trial Judge*, 1 LITIGATION 22 (1975).

18. WIS. STAT. § 971.20 (1979), *repealed and recreated by* 1981 Wis. Laws 137.

19. Some writers have also termed the third category a peremptory procedure, but in *Holmes* the Wisconsin Supreme Court refers to only the fourth category as peremptory. E.g., Frank, *supra* note 17, at 65; Comment, *Disqualification of Federal District Judges — Problems and Proposals*, 7 SETON HALL L. REV. 612, 633 (1976); Note, *supra* note 17, at 159; Note, *Peremptory Challenges of Judges in the Alaska Courts*, 6 U.C.L.A.-ALASKA L. REV. 269, 269-70 (1977).

two conflicting goals: ensuring a fair trial and administering justice efficiently. If a substitution procedure is too restrictive, some litigants may be denied a fair trial. If too lenient, the procedure may be subject to abuse by litigants seeking to avoid a judge perceived to be a harsh sentencer and by litigants seeking delay—purposes not related to a fair trial.²⁰

From 1853²¹ until 1969,²² Wisconsin followed a statutory procedure for substitution of judges in criminal cases which required the submission of an affidavit of prejudice. In the affidavit it was only necessary for the party to allege that a fair trial was not possible before the presiding judge.²³ Courts have uniformly sustained numerous challenges to the constitutionality of statutes which follow the same pattern as Wisconsin's previous affidavit of prejudice format.²⁴

Wisconsin discarded the affidavit of prejudice with the passage of a statute²⁵ which instead required the filing of "a written request for a substitution of a new judge for the

20. For a discussion of this problem see Note, *Substitution of Judges in Illinois Criminal Cases*, 1978 U. ILL. L.F. 519.

It has been pointed out that delay is particularly a problem in Wisconsin's 36 one-judge counties where a case is not heard until a judge from another county becomes available. *State v. Hudson*, No. K-1283, slip op. at 13 (Milwaukee County Cir. Ct. Sept. 24, 1981). This is very costly and inefficient in northern Wisconsin counties where judges must travel long distances to hear cases in which a defendant has substituted against a local judge. *Id.* at 14. A further criticism of the substitution statute is that it may stifle judicial attempts at discipline and reform because a judge fears reprisals by the bar in the form of substitutions. *State v. Holmes*, No. 81-TR-335, slip op. at 8 (Polk County Cir. Ct. Aug. 21, 1981).

21. 1853 Wis. Laws 75, § 1.

22. WIS. STAT. § 956.03 (1967), *repealed by* 1969 Wis. Laws 255, § 55.

23. Disqualification was predicated upon the imputation of prejudice without proof that the prejudice existed. *Bachmann v. City of Milwaukee*, 47 Wis. 435, 2 N.W. 543 (1879). Once the affidavit was timely filed, the trial judge had no further jurisdiction except to remove himself and order that another judge be called. *Dutcher v. Phoenix Ins. Co.*, 37 Wis. 2d 591, 155 N.W.2d 609 (1968).

24. *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570 (Alaska 1969); *Solberg v. Superior Ct.*, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977); *Johnson v. Superior Ct.*, 50 Cal. 2d 693, 329 P.2d 5 (1958); *Hulme v. Woleslagel*, 208 Kan. 385, 493 P.2d 541 (1972); *State ex rel. Peery v. District Ct.*, 145 Mont. 287, 400 P.2d 648 (1965); *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 30 Mont. 529, 77 P. 312 (1904); *State ex rel. Beach v. Fifth Judicial Dist. Ct.*, 53 Nev. 444, 5 P.2d 535 (1931); *Moruzzi v. Federal Life & Casualty Co.*, 42 N.M. 35, 75 P.2d 320 (1938); *State ex rel. Hannah v. Armijo*, 38 N.M. 73, 28 P.2d 511 (1933); *U'ren v. Bagley*, 118 Or. 77, 245 P. 1074 (1926); *see also* Annot., 46 A.L.R. 1179 (1927).

25. WIS. STAT. § 971.20 (1969).

judge assigned to the trial of that case.”²⁶ This statute required neither that any grounds for substitution be given nor that any allegation of prejudice be made, thus making the substitution a purely peremptory one against the presiding judge. The peremptory substitution procedure existing in Wisconsin is not unique.²⁷ Until *Holmes*, however, the constitutionality of the Wisconsin substitution statute had not been challenged, although similar peremptory statutes had been challenged on five occasions in other states.²⁸ All were declared unconstitutional violations of the separation of powers doctrine.²⁹

II. THE *HOLMES* DECISION

Holmes was a combined opinion addressing two circuit court criminal actions.³⁰ In each case the trial court judge denied the request of the defendant for a substitution of judge. The respective judges ruled that the substitution statute was unconstitutional because it interfered with the function of the judiciary in violation of the separation of powers doctrine.³¹

In both cases the supreme court allowed a bypass of the court of appeals.³² The circuit judges argued to the supreme

26. *Id.* § 971.20(1).

27. Two states have statutes with peremptory substitution. MINN. STAT. ANN. § 487.40 (West Supp. 1982); N.D. CENT. CODE § 29-15-21 (1974 & Supp. 1981). The North Dakota statute also requires a statement saying that the request is made in good faith and not for the purpose of delay. Six state courts have promulgated rules calling for peremptory substitution. ALASKA R. CRIM. P. 25(d); ARIZ. R. CRIM. P. 10.2; IDAHO R. CIV. P. 40(d)1; IND. R. CRIM. P. 12; MONT. CODE ANN. § 3-1-802 (1981); WYO. R. CRIM. P. 23.

28. See *supra* note 3.

29. *Id.*

30. The two circuit court cases from which the action arose are *State v. Hudson*, No. K-1283 (Milwaukee County Cir. Ct. Sept. 24, 1981) and *State v. Holmes*, No. 81-TR-335 (Polk County Cir. Ct. Aug. 21, 1981).

31. *Id.*

32. In *Holmes* the defendant and the state petitioned the court of appeals for leave to appeal the order of the court for briefs from the parties on the statute's constitutionality. The court of appeals granted the petition for leave to appeal and certified the matter to the supreme court. The supreme court accepted certification.

In *Hudson* the defendant petitioned the court of appeals to exercise supervisory jurisdiction over the circuit court and sought a writ of prohibition ordering the judge from taking any further action in the matter. The defendant also petitioned the supreme court to bypass the court of appeals. The supreme court granted the bypass.

court that the 1969 statute revision was enacted for "tactical reasons"³³ rather than for ensuring a fair trial, and that the deleterious impact on the judicial system outweighed any benefits derived from the statute.³⁴ The lower court judges viewed the statute as an unreasonable legislative encroachment on the state criminal trial courts.

As will be discussed in the sections that follow, Justice Abrahamson, writing for the court, addressed four separate issues in reaching the primary one: whether Wisconsin's judicial substitution statute is constitutional under the separation of powers doctrine. The court first dealt with the question of whether it was proper for the trial judge to raise the issue of the constitutionality of the substitution statute *sua sponte*.³⁵ The court then considered the relationship of the doctrine of separation of powers to the substitution statute.³⁶ Next, the court addressed the contention of the circuit judges that the substitution statute was not a valid exercise of legislative power because, unlike the affidavit of prejudice procedure, a peremptory substitution procedure was not designed to assure a fair trial.³⁷ Finally, the court considered whether the operation and potential abuse of the substitution statute impaired the proper functioning of the courts so as to constitute a violation of the doctrine of separation of powers.³⁸ In a separate concurring opinion, Justice Coffey stated strong misgivings about the substitution statute. He agreed, however, that the statute had not been proved beyond a reasonable doubt to impair the court's functioning to such an extent as to be unconstitutional.³⁹

33. *State v. Holmes*, 106 Wis. 2d 31, 56, 315 N.W.2d 703, 715 (1982). This argument is based on the wording of WIS. STAT. ANN. § 971.20 Judicial Council note (West 1981): "This [sec. 971.20] is new terminology replacing former s. 956.03(1). 'Affidavit of Prejudice' has normally not meant prejudice since most defendants have no knowledge of the judge and have filed the affidavit solely for tactical purposes usually on an attorney's advice."

34. Brief for Respondents at 20, *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

35. *Holmes*, 106 Wis. 2d at 38, 315 N.W.2d at 707.

36. *Id.* at 41, 315 N.W.2d at 708.

37. *Id.* at 52, 315 N.W.2d at 713.

38. *Id.* at 68, 315 N.W.2d at 721.

39. *Id.* at 75, 315 N.W.2d at 724.

A. Constitutional Challenge by the Trial Court

Before determining the key constitutional issue in *Holmes*, the court dealt with the question of whether a circuit court has the authority to consider the constitutionality of a statute sua sponte.⁴⁰ The supreme court declared that the involvement by the trial court in questioning the constitutionality of a statute was appropriate for two reasons.⁴¹ First, the resolution of the constitutional question affected the proper disposition of the case before it and as such was a "natural outgrowth of the court's function to do justice between the parties."⁴² Second, the circuit court had inherent power to protect itself against an impairment of its judicial function.⁴³

The authority of a trial court to pass upon the constitutionality of a statute when the issue was properly presented to it had been affirmed previously.⁴⁴ The Wisconsin Supreme Court has posed its own constitutional challenges to legislation which it considered to have had an effect on the duty and authority of the judicial branch.⁴⁵ However, *Holmes* is the first instance where the supreme court directly recognized the ability of a trial court to identify and resolve issues which have a direct bearing on the administration of justice.

The explicit holding that a trial court may raise a constitutional question sua sponte may affect future litigation in two ways. *Holmes* may be read as an approval of a more activist role for Wisconsin trial courts with respect to the constitutionality of procedural statutes. Also, an additional level of complexity will be introduced in litigation if the court, in a sense, becomes an advocate in the dispute.⁴⁶

40. *State v. Holmes*, 106 Wis. 2d 31, 38, 315 N.W.2d 703, 707 (1982).

41. *Id.*

42. *Id.* at 39, 315 N.W.2d at 707.

43. *Id.* at 40, 315 N.W.2d at 708.

44. *State v. Johnson*, 79 Wis. 2d 169, 246 N.W.2d 503 (1976); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

45. *Rules of Court Case*, 204 Wis. 501, 236 N.W. 717 (1931); *In re Appointment of Revisor*, 141 Wis. 592, 124 N.W. 670 (1910).

46. In *Holmes* the Wisconsin Supreme Court appointed counsel to represent the circuit judges. 106 Wis. 2d at 37 n.5, 315 N.W.2d at 706 n.5.

B. *The Separation of Powers Doctrine*

The *Holmes* court noted that although the separation of powers doctrine is not expressly stated in the Wisconsin Constitution, the concept is intrinsic in the provisions vesting each branch of state government with distinct powers.⁴⁷ The court followed earlier Wisconsin decisions which indicated that while one branch could not exercise the power of another branch, there was an "overlap" between the branches where the delegation of power is ambiguous.⁴⁸ The court determined that it was into this "twilight zone" that the regulation of substitution of judges fell because both the legislative and judicial branches are empowered to enact laws or rules to ensure a litigant a fair trial.⁴⁹ However, the court strongly asserted that under the separation of powers doctrine it had the responsibility to review acts of the legislature when those acts might unreasonably impede the court's power.⁵⁰ The court then turned to an analysis of whether the peremptory substitution statute violated the doctrine, examining the two arguments made by the circuit judges attacking the validity of the statute.

1. Fair Trial Objective

The court first dealt with the contention of the circuit court judges that the peremptory substitution statute did not fall within the area in which the legislature can enact laws regulating judicial procedures because the statute was designed to give defendants a tactical advantage rather than to ensure a fair trial.⁵¹ The court conceded that the words "tactical purposes" in the Judicial Council's note were misleading, but stated that when read in the context of additional notes,⁵² it was evident that the reason for changing from the words "affidavit of prejudice" to "substitution of

47. *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703, 708 (1982).

48. *Id.* at 43, 315 N.W.2d at 709. *See also* *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943); *In re Appointment of Revisor*, 141 Wis. 592, 124 N.W. 670 (1910).

49. 106 Wis. 2d at 43-44, 315 N.W.2d at 709.

50. *Id.* at 68, 315 N.W.2d at 721.

51. *See supra* note 33.

52. The court stated that the following note clarified the fact that the new statute changed terminology, but not substance or statutory purpose:

judge upon the written request of the defendant" was merely a change in terminology and procedure, not a change in substance or purpose.⁵³ Rather than to give defendants a tactical advantage, according to the court, the wording was changed because it was unclear how broadly the word "prejudice" should be interpreted in the affidavits,⁵⁴ and also because the use of the word "prejudice" impugned the integrity of the bench.⁵⁵

Acknowledging that the peremptory challenge statute had potential for abuse, the court added that this was likewise true of the affidavit of prejudice.⁵⁶ To illustrate that peremptory substitution was a recognized procedure for ensuring a fair trial, the court cited the seven states whose supreme courts adopted a peremptory substitution procedure.⁵⁷ The court stated that although the wisdom and operation of the procedure had been challenged and the legislature had bills pending which could better balance the right to a fair trial with the efficient operation of the judicial system, it could not conclude that the substitution statute was "an unconstitutional exercise of legislative power to en-

While not changing the practical effects of the present affidavit of prejudice law, the bill provides for the "substitution of a judge" upon the written request of the defendant. It is felt that most affidavits of prejudice are not truly that in present practice and it is more realistic to call them by what they really are, a request for another judge to hear the particular case.

1969 Wis. Laws 255, Judicial Council prefatory note, cited in *Holmes*, 106 Wis. 2d at 56, 315 N.W.2d at 715. This wording, however, does not appear to completely dispel the contention that the legislature recognized the usage of peremptory substitution for tactical reasons.

53. 106 Wis. 2d at 55-56, 315 N.W.2d at 715.

54. *Id.* at 57, 315 N.W.2d at 715. The court stated that there was uncertainty as to whether "prejudice" should be interpreted narrowly to mean an actual interest in the case, or broadly to include even the appearance of prejudice.

55. *Id.* at 60, 315 N.W.2d at 717. The circuit court stated that a judge's integrity was impugned because the judge could not defend himself or herself against the charge of prejudice. The court also felt the use of the peremptory challenge distorted the public's picture of the impartiality of the judiciary.

56. *Id.* at 59, 315 N.W.2d at 716.

57. *Id.* at 63, 315 N.W.2d at 718. See *supra* note 27 for a listing of the court rules. These rules cannot be challenged as a violation of the separation of powers doctrine because they were adopted by the judicial branch. The Wisconsin court also stated that peremptory substitution was a procedure which was recognized by the National Conference of the Commissioners on Uniform State Laws and the American Bar Association Commission on Standards of Judicial Administration. *Holmes*, 106 Wis. 2d at 64, 315 N.W.2d at 719.

sure fair trials."⁵⁸

2. Court Impairment Issue

After determining that the statute was enacted to ensure a fair trial, an area in which the legislature is not prohibited by the separation of powers doctrine from acting, the court then had to determine whether the statute violated the doctrine by unduly interfering with the judicial system. The test employed to determine whether the substitution statute was an unconstitutional interference with the judicial branch was whether the challengers to the constitutionality proved beyond a reasonable doubt⁵⁹ that the operation of the statute, including its abuse not related to a fair trial, "materially impairs or practically defeats the circuit court's exercise of jurisdiction and power or the proper functioning of the judicial system."⁶⁰

The court briefly discussed the practical problems which the circuit court judges had identified as being associated with the statute.⁶¹ According to the court, the number of substitutions, when viewed as a percentage of all cases tried, did not indicate a significant impairment of the system.⁶² The delays, increased costs, inefficiencies and inconveniences were problems which the legislature had balanced

58. *Id.* at 68, 315 N.W.2d at 721.

59. It is a long-established standard in Wisconsin that any doubt must be resolved in favor of the constitutionality of a statute and the unconstitutionality must be proven beyond a reasonable doubt. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 293 N.W.2d 504, *cert. denied*, 449 U.S. 1035 (1980); *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 118 N.W.2d 211 (1962); *Peterson v. Widule*, 157 Wis. 641, 147 N.W. 966 (1914).

60. 106 Wis. 2d at 69, 315 N.W.2d at 721. The court adopted this language from two Wisconsin cases, *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943), and *John F. Jelke Co. v. Beck*, 208 Wis. 650, 242 N.W. 576 (1932). The language is also very similar to the standard used by the California Supreme Court in *Solberg v. Superior Ct.*, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977), where it was applied to a challenge to an affidavit of prejudice. In *Solberg* the court held that the statute did not "substantially impair" or "practically defeat" the constitutional jurisdiction of the trial courts. *Id.* at ___, 561 P.2d at 1162, 137 Cal. Rptr. at 474.

61. 106 Wis. 2d at 70, 315 N.W.2d at 722.

62. The court estimated that 4,900 substitutions were filed in 1981 in civil and criminal cases; these would total less than a five percent substitution rate in all criminal cases. The Director of State Courts compiled the actual number of substitutions in the state at 4,430. Forty-five percent of those were in criminal cases. Letter from J. Dennis Moran, Director of State Courts, to Linda de la Mora (June 16, 1982).

against the statute's beneficial aspects.⁶³ The court did not feel these were proved to substantially impair or defeat the court's functioning. The court stated that the abuses of judge shopping and avoidance of judges known for severe sentences, and the concerns that the statute undermined court attempts at discipline and reform and gave the Bar power to control the court, were serious concerns of which they were aware.⁶⁴ However, the court felt the legislature was ready and willing to modify the statute "to remove such undesirable features as it can consistent with its goal of securing both the fact and appearance of fairness in judicial proceedings."⁶⁵ Justice Abrahamson concluded her opinion by stating that although the members of the court were not in complete agreement on the wisdom of the peremptory substitution statute, they all agreed that it had not been proved beyond a reasonable doubt to be an unconstitutional violation of the doctrine of separation of powers.⁶⁶

C. Justice Coffey's Concurrence

Although there was unanimous agreement on the supreme court that no violation of the separation of powers doctrine had been established, Justice Coffey wrote a concurring opinion which unquestionably echoed the Wisconsin

63. *Holmes*, 106 Wis. 2d at 72, 315 N.W.2d at 722. For an articulate discussion of the problems the substitution statute causes in terms of delay and inefficiency in one-judge counties see *State v. Chosa*, No. 81-M-85 (Vilas County Cir. Ct. Oct. 1, 1981). For further discussion of the practical problems substitution creates, see Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445 (1981). See Comment, *Peremptory Challenges of Judges: The Arizona Experience*, 1973 LAW & SOC. ORDER 95, for a description of why adoption of peremptory substitution did not have a negative impact.

64. 106 Wis. 2d at 72-73, 315 N.W.2d at 723. For a discussion of the problems of judge shopping see *State v. Hudson*, No. K-1283 (Milwaukee County Cir. Ct. Sept. 24, 1981). For a discussion of how the pressures the substitution statute creates on a judge hinder reform and discipline, see *State v. Holmes*, No. 81-TR-355 (Polk County Cir. Ct. Aug. 21, 1981).

65. 106 Wis. 2d at 74, 315 N.W.2d at 724.

66. *Id.* Two justices have stated their displeasure with WIS. STAT. § 971.20 (1979), *repealed and recreated by* 1981 Wis. Laws 137. See *State ex rel. Warrington v. Circuit Ct.*, 100 Wis. 2d 726, 303 N.W.2d 590 (1981) (Callow, J., concurring); *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 298 N.W.2d 552 (1980) (Coffey, J., concurring). Both Justices Callow and Coffey were trial judges before assuming their positions on the supreme court, and both have urged the legislature to amend the substitution statute to avoid abuse.

trial judges' misgivings about the substitution statute.⁶⁷ In many respects, he reiterated the arguments advanced by the circuit court judges which the *Holmes* majority found unpersuasive. He underscored the delays, fiscal costs and disruption which liberal procedures for substitution of judges foster.⁶⁸ He also pointed out that the "vast majority" of states had not adopted peremptory substitution.⁶⁹ His opinion, in a postscript fashion, appealed to the legislature to undertake a more critical examination of the impact of a substitution statute. While inviting a closer examination, perhaps leading to legislative adjustments, he expressly refrained from endorsing any contention that the legislature has a continuing authority or responsibility to superintend the courts.⁷⁰ He expressed doubt that with the passage of a 1977 amendment to the Wisconsin Constitution⁷¹ there remains any authority in the legislature to enact rules regarding court administration. It was his position that this amendment vests exclusive rule-making authority in the supreme court.⁷²

III. THE AFTERMATH OF *HOLMES*

Three weeks after the *Holmes* decision was issued, the legislature enacted one of three pending bills which proposed a change in the criminal substitution statute.⁷³ Rejecting a bill which would return to the affidavit of prejudice procedure⁷⁴ and another which would extend the current peremptory substitution right to the district attorney,⁷⁵ the legislature retained the peremptory procedure, but limited

67. *State v. Holmes*, 106 Wis. 2d 31, 75, 315 N.W.2d 703, 724 (1982) (Coffey, J., concurring).

68. *Id.* at 78-79, 315 N.W.2d at 726.

69. *Id.* at 79, 315 N.W.2d at 726. See *supra* note 24.

70. *Id.* at 75-76, 315 N.W.2d at 724.

71. Wis. CONST. art. VII, § 3, provides in relevant part: "The supreme court . . . shall have . . . superintending and administrative authority over all . . . courts . . ."

72. 106 Wis. 2d at 77, 315 N.W.2d at 725.

73. 1981 Wis. Laws 137 repealed and recreated Wis. STAT. § 971.20 (1979) and amended Wis. STAT. § 801.58 (1979), the civil substitution statute.

74. Wis. A. Res. 218 (1981).

75. Wis. S. Res. 48 (1981); Wis. A. Res. 90 (1981).

the number of substitutions per defendant to one.⁷⁶ The

76. 1981 Wis. Laws 137 (to be codified at Wis. STAT. § 971.20) provides as follows:

Substitution of Judge.

(1) **DEFINITION.** In this section, "action" means all proceedings before a court from the filing of a complaint to final disposition at the trial level.

(2) **ONE SUBSTITUTION.** In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section.

(3) **SUBSTITUTION OF JUDGE ASSIGNED TO PRELIMINARY EXAMINATION.** A written request for the substitution of a different judge for the judge assigned to preside at the preliminary examination may be filed with the clerk, or with the court at the initial appearance. If filed with the clerk, the request must be filed at least 5 days before the preliminary examination unless the court otherwise permits. Substitution of a judge assigned to a preliminary examination under this subsection exhausts the right to substitution for the duration of the action, except under sub. (7).

(4) **SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED.** A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

(5) **SUBSTITUTION OF TRIAL JUDGE SUBSEQUENTLY ASSIGNED.** If a new judge is assigned to the trial of an action and the defendant has not exercised the right to substitute an assigned judge, a written request for the substitution of the new judge may be filed with the clerk within 15 days of the clerk's giving actual notice or sending notice of the assignment to the defendant or the defendant's attorney. If the notification occurs within 20 days of the date set for trial, the request shall be filed within 48 hours of the clerk's giving actual notice or sending notice of the assignment. If the notification occurs within 48 hours of the trial or if there has been no notification, the defendant may make an oral or written request for substitution prior to the commencement of the proceedings.

(6) **SUBSTITUTION OF JUDGE IN MULTIPLE DEFENDANT ACTIONS.** In actions involving more than one defendant, the request for substitution shall be made jointly by all defendants. If severance has been granted and the right to substitute has not been exercised prior to the granting of severance, the defendant or defendants in each action may request a substitution under this section.

(7) **SUBSTITUTION OF JUDGE FOLLOWING APPEAL.** If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

(8) **PROCEDURES FOR CLERK.** Upon receiving a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge for the determination and reassignment of the action as necessary. If the request is determined to be proper, the clerk shall request the assignment of another judge under s. 751.03.

(9) **JUDGE'S AUTHORITY TO ACT.** Upon the filing of a request for substitution in proper form and within the proper time, the judge whose substitution

notes accompanying one senate bill state that "[t]he statute is not to be used for delay nor for 'judge shopping,' but is to ensure a fair and impartial trial for the defendants."⁷⁷

The *Holmes* court specifically mentioned that it anticipated that one of several pending bills would be enacted to modify the criminal substitution statute.⁷⁸ Some of the language in *Holmes* may have been intended to give the legislature direct guidance as to necessary changes in the statute. The new legislation has the potential for correcting some of the abusive practices previously identified. The limitation of a defendant to one substitution will reduce the problem of judge shopping.⁷⁹ The statute also specifies the time limits during which a defendant must, at each stage of criminal proceedings, request a substitution of judge.⁸⁰ This may minimize the problem of delay to a degree. However, the potential for the avoidance of judges perceived to be tough

has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail.

(10) FORM OF REQUEST. A request for substitution of judge may be made in the following form:

STATE OF WISCONSIN
CIRCUIT COURT

. . . . COUNTY

State of Wisconsin

vs.

. . . . (Defendant)

Pursuant to s. 971.20 the defendant (or defendants) request(s) a substitution for the Hon. . . . as judge in the above-entitled action.

Dated , 19

. . . . (Signature of defendant or defendant's attorney)

(11) RETURN OF ACTION TO SUBSTITUTED JUDGE. Upon the filing of an agreement signed by the defendant or defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge, the criminal action and all pertinent records shall be transferred back to the substituted judge.

77. Wis. S.B. 163 (1981) (note expressing the idea that Wis. STAT. § 971.20 is not to be used for tactical reasons); *see supra* note 33.

78. State v. Holmes, 106 Wis. 2d 31, 62 n.27, 315 N.W.2d 703, 718 n.27 (1982).

79. Wis. STAT. § 971.20 (1979), *repealed and recreated by* 1981 Wis. Laws 137, was construed to allow up to three substitutions in felony cases: one at the arraignment, a second at the preliminary hearing stage, and a third if, because of a court overload, the case had to be shifted to another judge. Interview with Robert Erdman, Clerk of the Criminal Division, Milwaukee County Courts (June 21, 1982). The new statute limits defendants in criminal cases to one substitution request unless bias is shown or the case is remanded for a new trial or sentencing by an appellate court.

80. 1981 Wis. Laws 137 (to be codified at Wis. STAT. § 971.20). *See supra* note 76.

sentencers continues. The cost and inefficiency associated with travel by judges also remain where there is a substitution filed in one-judge counties.

On January 5, 1983, the Wisconsin Supreme Court denied the request of the Judicial Conference⁸¹ to amend section 971.20 to require that all requests for substitution made pursuant to that statute be based upon a showing of cause in a sworn affidavit and to provide that a denial of any substitution request be administratively reviewable by the chief judge of the district in which the action is pending or, in the event the judge sought to be replaced is the chief judge, by the chief judge of an adjoining district.⁸² Noting the petitioners' lack of supporting data, the court relied on *Holmes* in deciding not to allow a return to the pre-1969 affidavit of prejudice system:

The present judge substitution statute has not been in effect for a period of time sufficient to demonstrate any change in judge substitutions as they affect judicial administration. Further, the petitioner has not presented any new information on the number and effect of judge substitutions on judicial administration which would warrant amending the peremptory aspect of the law. Consequently, in light of the recent change in the judge substitution statute and the court's ruling in *Holmes*, the petition is denied.⁸³

This petition, albeit unsuccessful, demonstrates the trial bench's dissatisfaction with the current substitution statute.⁸⁴ But the supreme court has evidenced a disposition to allow

81. The Judicial Conference is made up of the justices of the supreme court, the judges of the court of appeals, judges of the circuit courts, reserve judges and three municipal judges representing the municipal courts. Wisconsin Legislative Reference Bureau, STATE OF WISCONSIN 1981-1982 BLUE BOOK 592 (1982).

82. *In re* Rules of Criminal Procedure: Sec. 971.20, Stats., slip op. (Wis. filed Jan. 5, 1983). The Judicial Council's proposal was similar to the current federal substitution procedure, *see supra* note 17, and to the Wisconsin substitution procedure prior to 1969, *see supra* notes 21-23 and accompanying text. *Holmes*, 106 Wis. 2d 49, 315 N.W.2d at 712.

83. *In re* Rules of Criminal Procedure: Sec. 971.20, Stats., slip op. (Wis. filed Jan. 5, 1983).

84. In response to a questionnaire sent to all state trial judges before the Judicial Council met, 61 indicated their support for such a proposal, 11 expressed opposition and 4 indicated no opinion. Telephone conversation with Dane County Circuit Court Judge Mark A. Frankel (Oct. 21, 1982). The statutory compilation was appended to the petition submitted to the court. *See supra* note 81.

the legislature's 1981 version of section 971.20 a fair chance to be put into practice before they will change it by judicial decree.⁸⁵

IV. ANALYSIS

The *Holmes* decision may be viewed as implicitly encouraging trial and appellate courts to review legislation affecting judicial procedure. If this was the court's intention, the decision fails to provide any standards for that review other than the separation of powers doctrine. The court did not give lower courts any detailed guidelines for testing the procedural validity of a specific piece of legislation.⁸⁶

The Coffey concurrence, in dicta, suggested that the 1977 constitutional amendment⁸⁷ may have had the preemptive effect of limiting the right of judicial rule-making solely to the judiciary.⁸⁸ The majority opinion does not consider this argument. It is problematical because if the court were to have entertained this contention, it would have had to resolve the question of the retroactive application of the constitutional provision.⁸⁹ Such a line of analysis would have had implications for other judicial procedural legislation as

85. On November 1, 1982, the supreme court denied a petition of the Judicial Council that WIS. STAT. § 971.20(4) be amended to read as follows:

A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment. If the defendant is without notice of the identity of the originally assigned trial judge until arraignment or thereafter, that judge is deemed a new judge and the defendant may request substitution under sub. (5).

JUDICIAL COUNCIL NOTE. 1982: Subsection (4) is amended so that the time period for requesting substitution of the originally assigned trial judge cannot expire before the defendant has notice of the identity of that judge. It does not allow the defendant to request the substitution of more than one judge in any action.

In re Amendment of Rules of Civil Procedure, Criminal Procedure, Rules of Appellate Procedure and Supreme Court Rules, reported in 55 WIS. B. BULL., Sept. 1982, at 63, 63-64. The supreme court's denial of this petition may reflect the court's view that any modification of the substitution statute is a legislative prerogative because judicial substitution is a substantive concern.

86. In *Holmes* the court admitted that "the test [of] 'material impairment or practical defeat of the proper functioning of the judicial system' is not without ambiguity" State v. *Holmes*, 106 Wis. 2d 31, 70, 315 N.W.2d 703, 722 (1982).

87. See *supra* note 71.

88. *Holmes*, 106 Wis. 2d at 77, 315 N.W.2d at 725.

89. Original WIS. STAT. § 971.20 was codified in 1969, prior to the 1977 amendment of WIS. CONST. art. VII, § 3.

well. Perhaps the court felt that it was unnecessary to explore such consequences since a legislative correction was deemed imminent. By not addressing this argument, the court effectively reserved the possibility that it might be raised as a challenge to the new substitution statute at a later date if judicial administrative problems are not appreciably lessened by the new statute. Moreover, a preemption challenge would not necessarily face the difficult burden of being established beyond a reasonable doubt as would be the case in a challenge to the constitutionality of a statute.

V. CONCLUSION

In the *Holmes* decision, the Wisconsin Supreme Court clearly indicated its feeling that the right to a fair trial outweighed any of the problems peremptory substitution created. While the court expressed very strong misgivings about the statute, it appeared to be unwilling to take the extreme step of declaring it to be unconstitutional at a time when the legislature appeared to be on the threshold of changing the statute.

The new statute eliminates the contention that the substitution procedure was intended by the legislature to be used for tactical advantages rather than for achieving a fair trial. Limiting substitutions to one should lessen to some degree the problems of delay and judge shopping in felony cases.

Holmes appears to firmly legitimize the use of peremptory substitution in all areas of the law in Wisconsin. This decision recognizes a standard to be followed in determining whether a statute infringes upon judicial powers, and confirms the right of a trial court to raise the issue of the constitutionality of a statute where it is relevant but not addressed by the parties. A more detailed articulation of the parameters of the separation of powers doctrine and the application of those parameters to judicial procedure is left to future litigation. Since *Holmes* represents the first instance in which a state supreme court has upheld a peremptory substitution statute as constitutional, the decision may be influential in other states which may be considering adopting or modifying judicial substitution statutes.

